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IN THE

Supreme Court of the United States

October Term, 1982

CITY OF AKRON, *et al.*,

Defendants-Petitioners,

vs.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., *et al.*,

Plaintiffs-Respondents.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., *et al.*,

Plaintiffs-Petitioners,

vs.

CITY OF AKRON, *et al.*,

Defendants-Respondents.

On Certiorari to United States Court Of Appeals for the Sixth Circuit.

BRIEF AMICI CURIAE OF CALIFORNIA WOMEN LAWYERS AND WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES.

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BRIEF AMICI CURIAE OF CALIFORNIA WOMEN LAWYERS AND THE WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES

INTEREST OF AMICI

Amici organizations have been actively involved in legal issues which affect the

rights of all women and are committed to preserving freedom of reproductive choice. As bar associations, amici organizations are particularly sensitive to attempts to use the law to erode the rights of women. Accordingly, amici organizations seek to present the reasons they believe the challenged ordinances should be found unconstitutional.

CALIFORNIA WOMEN LAWYERS is a statewide bar association in California which advocates for and educates about the legal rights of women. As an umbrella organization, it represents the interest of approximately 10,000 women lawyers and its affiliates include eleven of the largest local women's bar associations in the state.

WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES ("WLALA") is a county-wide bar association affiliated with the Los Angeles County Bar Association. Its members are

approximately 950 male and female lawyers, law students and judges who are concerned with the special problems affecting women in our society. The right of procreative choice is of unique concern to women. WLALA actively opposes all laws which attempt to abridge, limit or deny women's right to legal abortion.

Consent of the parties has been obtained for the submission of this brief by the undersigned amici curiae.

SUMMARY OF ARGUMENT

The principle that this Court is the ultimate arbiter of constitutional rights is a fundamental tenet of our system of government. To depart from this principle because of the emotional and political nature of abortion would gravely damage basic principles of the American constitutional system.

In Roe v. Wade and other cases involving fundamental rights, this Court has established that the appropriate standard of review is whether a challenged regulation is justified by a compelling state interest and whether the regulation is narrowly drawn to further that interest.

Application of the Roe v. Wade standard should result in this Court finding that the Akron restrictions cannot be justified by any compelling state interest and are overly broad.

ARGUMENT

I

The constitutionality of the challenged abortion regulations, as with all regulations affecting fundamental rights, should be determined by this Court, not state legislatures.

In its Brief Amicus Curiae for the United States, the Department of Justice argues that this Court should accord "significant weight" to the judgment of state legislatures in determining the constitutionality of abortion regulations. This argument is based upon the mistaken characterization of this issue as a policy determination. This Court does not make a policy choice in determining the constitutionality of a statute or ordinance. Rather, the determination is made by testing the questioned legislation against an objective, constitutional standard. Whether the tested regulation survives this scrutiny is not influenced by

considerations of policy. Laudatory regulations, as well as reprehensible ones, must pass the constitutional test when challenged.

Whether one segment of society believes a regulation is oppressive or exemplary is irrelevant to the determination of constitutionality. As this Court has declared, a determination that a particular regulation is or is not constitutional "is not based on a weighing of its wisdom or social desirability, for this Court does not strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.'" Maher v. Roe, 432 U.S. 464, 479 (1977), quoting Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955). The Court is frequently faced with issues on which reasonable people may differ, indeed, on which reasonable people passionately

disagree. Yet, as Justice Holmes pointed out in his often quoted dissenting opinion in Lochner v. New York:

> "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." 198 U.S. 45, 76 (1905).

Amici do not believe that the issues facing the Court in determining the constitutionality of the challenged abortion restrictions differ significantly from the issues to be settled in determining the constitutionality of any other regulation affecting fundamental rights. Unquestionably, many individuals hold widely different and passionately felt convictions regarding abortion. The issue has been the focus of a longstanding national debate. However, we believe that the passions and

controversy surrounding abortion have heightened since the Court acknowledged the "sensitive and emotional nature of the abortion controversy" and determined that its task was to "resolve the issue by constitutional measurement, free of emotion and of predilection." Roe v. Wade, 410 U.S. 113, 116 (1973).

The Justice Department, in its Amicus Brief, raises issues regarding judicial review that were the focus of intense debate at the time the United States Constitution was adopted, Hamilton, The Federalist, Nos. 45-49, 78, and which continued unabated well into the formative years of our Government. In an effort to resolve this controversy within the framework of the Constitution, Justice Marshall wrote several landmark decisions which established that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v.

Madison, 1 Cranch 137, 177 (1803). See also, Fletcher v. Peck, 6 Cranch 87 (1810); Martin v. Hunter's Lessee, 1 Wheat. 304 (1816); Cohens v. Virginia, 6 Wheat. 264 (1821). In recent years, the Court has reaffirmed this vision of judicial authority in the strongest terms. U.S. v. Nixon, 418 U.S. 683, 705 (1974); Baker v. Carr, 369 U.S. 186, 211 (1962). As the Court declared in Cooper v. Aaron, "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution . . . has ever since [Marbury] been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." 358 U.S. 1, 18 (1958).

In its Amicus Brief the Justice Department poses the question "[w]hich branch [i.e., judicial or legislative] should have a presumed preference in lawmaking authority in those areas that

might properly belong to either?" This is a misconception of the issues. The ultimate determination of constitutionality does not properly belong to either under our governmental system. It is a basic premise of constitutional law that this authority vests in the Courts. "The Courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the constitution, may declare them to be of no legal validity." Martin v. Hunter's Lessee, 1 Wheat. 304, 344 (1816).

The Justice Department further argues that individual persons are the best judges of which rights they deem "most fundamental" and that these individuals elect legislators to carry out their preferences, who then enact the public will into law. Therefore, according to this argument, legislative enactments must be regarded as

the supreme expression of the public will and may suffer no constitutional review. The implications arising from this argument are enormous and go to the very heart of our constitutional system. It is most astonishing to amici that this argument should be made on behalf of the United States. Yet again, Justice Story's words provide the most eloquent rebuttal to the Justice Department in declaring "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution . . . The constitution of the United States was designed for the common and equal benefit of all the people of the United States." Martin v. Hunter's Lessee, supra at 347-48.

The Constitution "is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it." Cohens v. Virginia, supra at

387. It does not deal in individual preferences or decisions influenced by the pressures and fashions of the moment. A legislature must, by its nature, be responsive to temporary forces. Because the legislature is subject to removal by the political process, it is not the appropriate body to ultimately determine the constitutionality of any enactment.

Legislative determinations are entitled to "careful attention." Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 103 (1973). But such attention does not constitute a deferral or render legislative actions immune from judicial scrutiny. Fullilove v. Klutznick, 448 U.S. 448, 473 (1980).

In determining the validity of the challenged abortion restrictions the issue is not whether the City of Akron should, as a matter of policy, regulate the performance of abortions or whether the means

chosen to regulate abortions are the most popular or appropriate ones, but rather, whether Akron has exercised its authority in a manner consistent with the United States Constitution.

II

Abortion regulations may be justified only by a compelling state interest and must be narrowly drawn.

The defendants, intervenors and the United States Justice Department, in its amicus curiae brief, inaccurately describe and distort the standard of review used by this Court in determining the constitutionality of regulations that restrict the abortion decision. They argue that any regulation of abortion is valid as long as it does not unduly burden a woman's decision to terminate her pregnancy. Not only is this view contrary to the standard established in Roe v. Wade, 410 U.S. 113 (1973), it is contrary to the standard applied by this Court in cases involving every other fundamental constitutional right.

In Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972) this Court set forth the appropriate form of analysis: "[I]f we

were to conclude that the Massachusetts statute impinges upon fundamental freedoms under Griswold [v. Connecticut, 381 U.S. 479 (1965)], the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest." (emphasis in original). And in Dunn v. Blumstein, 405 U.S. 330, 337 (1972), this Court, in concluding that a durational residence requirement for voting was unconstitutional, declared the test to be "whether the exclusions are necessary to promote a compelling state interest."

This Court has consistently followed the standard established in Roe v. Wade, supra, which held that state interference or regulation that burdens the abortion decision is permissible only when the state has demonstrated a compelling interest justifying the regulation.

The Justice Department suggests that the Court has retreated from or limited the scope of Roe v. Wade. On the contrary, the Roe v. Wade standard was affirmed in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), and has been followed in every abortion case reviewed by this Court since. For example, in Carey v. Population Services International, 431 U.S. 678, 688 (1977) this Court made it clear that state abortion regulations may be justified only by a compelling state interest and must be narrowly drawn to express only the legitimate state interests at stake. In Maher v. Roe, 432 U.S. 464, 475, this Court expressly states that its conclusion in that decision "signals no retreat from Roe or the cases applying it" and recognizes that "[t]here is a basic difference between direct state interference and state encouragement of an alternative activity." And again, in

Harris v. McRae, 448 U.S. 297, 312 (1980), this Court reaffirmed the Roe v. Wade standard by unequivocally stating that "if a law 'infinges upon a fundamental right . . . [it] is presumptively unconstitutional.'" (quoting Mobile v. Bolden, 446 U.S. 55, 76 (1980).)

Reliance on cases such as Bellotti I and II (Bellotti v. Baird, 428 U.S. 132 (1976); Bellotti v. Baird, 433 U.S. 662 (1977).), and H.L. v. Matheson, 450 U.S. 398 (1981), foster a distorted view of the appropriate standard of review in abortion cases. Amici believe that it is inappropriate to use these cases which dealt with the availability of abortions to minors as support for regulations limiting the availability of abortions to adult women. As this Court recognized in Danforth, supra, "the State has somewhat broader authority to regulate the activites of children than adults." 428 U.S. at 74.

Characterization of the appropriate standard of review as a "two-step analysis" or as an "unduly burdensome" test serves no purpose other than to cloud the issue before the Court. Regardless of how the appropriate standard is characterized, this Court has made it clear that, as with all other fundamental rights of privacy, state interference with the decision of a woman and her physician to terminate her pregnancy must be justified by a compelling state interest and any abortion regulation must be narrowly drawn to express that legitimate state interest.

Amici urge this Court to adhere to the standard of review established in Roe v. Wade and followed in the subsequent abortion decisions.

III

The Akron abortion regulations are not justified by a compelling state interest and are not narrowly drawn.

Amici urge this Court to adhere to the standard established in Roe v. Wade, supra, and subsequent abortion decisions, and find that the challenged abortion restrictions adopted by the City of Akron, Akron Ordinance 160-1978 (Chapter 1870), place an impermissible burden on the exercise of a fundamental privacy right and are not justified by a compelling state interest.

Application of this Court's ruling in Danforth, supra, to Akron's parental notice, parental consent, and second trimester mandatory hospitalization requirements, Chapters 1870.05 and 1870.03, should result in a finding of unconstitutionality.

This Court found that the consent requirements in Danforth effectively gave a person other than the patient and her

physician the right to veto an abortion decision. This was therefore contrary to Roe v. Wade which prohibits the state from exercising such a veto. The City of Akron's parental notification requirement is, similarly, impermissibly overbroad because it applies to both immature and mature, emancipated minors. See, Danforth, supra, and Bellotti II, supra.

The Akron mandatory hospitalization requirement's restrictive effect on a woman's abortion decision is no different from the restrictive effect of the regulation prohibiting saline amniocentesis as a method of abortion after the first twelve weeks of pregnancy that this Court found unconstitutional in Danforth.

In Danforth, the Court recognized the unavailability of safer alternative methods for terminating second trimester abortions and also acknowledged then current medical information that indicated that the saline

procedure was safer than childbirth. In view of this determination, the Court held the saline prohibition to be "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks." 428 U.S. at 78. The regulation did not withstand constitutional scutiny because the state failed to demonstrate that it furthered the state's interests in protecting maternal health.

The Akron mandatory hospitalization requirement should, similarly, be found unconstitutional. The record before this Court indicates that the dilation and evacuation ("D & E") procedure is the safest method of performing post-first trimester abortions today and that its performance in outpatient facilities is widely accepted in the medical community. The record also indicates that second trimester D & E abortions are also much safer than

childbirth. Nevertheless, only two hospitals in Akron perform second trimester abortions.

This regulation is precisely the kind of intereference rejected by this Court in Danforth. It serves no compelling state interest in protecting maternal health and only inhibits the vast majority of post-first trimester abortions in Akron. Women seeking post-first trimester abortions in Akron are burdened with the markedly increased cost and longer time period required by hospitalization. The Sixth Circuit's decision, Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198 (6th Cir. 1981), upholding the constitutionality of the "hospital only" requirement is clearly in conflict with this Court's decisions requiring abortion regulations to be narrowly drawn.

Furthermore, the Sixth Circuit's reliance on Gary-Northwest Indiana Women's

Services, Inc. v. Bowen, 421 F.Supp. 734 (N.D. Ind. 1976), aff'd 429 U.S. 1067 (1977), as authority for upholding the mandatory hospitalization requirement is misplaced for several reasons. 651 F.2d at 1208-10.

The Circuit Court was of the opinion that this Court's summary affirmance of Gary-Northwest precluded it from considering the "more detailed" evidence and constitutional considerations present in the Akron case. This Court has established that "the precedential effect of a summary affirmance can extend no further than 'the precise issues presented and necessarily decided by those actions.'" Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 182 (1979) (quoting Mandel v. Bradley, 432 U.S. 173 (1977).) The precise issues presented and decided in the instant case are significantly different from those in Gary-Northwest.

First, the Akron statute differs significantly from the Indiana statute. The Indiana statute's definition of hospital includes ambulatory outpatient medical centers, thereby allowing second trimester abortions to be performed in a facility other than a hospital accredited by the Joint Commission on Accreditation of Hospitals. On the other hand, the Akron statute requires the hospital to be JCAH accredited. Akron Ordinance Section 1870.01(B). In this regard the Akron statute is more restrictive.

Second, the District Court's decision in Gary-Northwest was based in part on its finding of certain evidentiary failures. 496 F.Supp. at 903. Little evidence was presented concerning the impact of the Indiana statute on the availability of second trimester abortion services. This is precisely the kind of evidence that this

Court found to be of critical importance in Danforth, supra at 77-79.

There is no failure of proof in the present case. The Sixth Circuit recognized that the evidence before it was "more detailed" and "abundant" than that produced in Gary-Northwest. 651 F.2d at 1209-10. It should also have recognized that this distinction undercuts the precedential value of Gary-Northwest. Indeed, this Court has cautioned lower courts not to blindly follow summary affirmances, Fusari v. Steinberg, 419 U.S. 379 (1975), and not to rely too heavily on summary affirmances when the factual issues presented in the two cases are different, Mandel v. Bradley, supra.

Finally, it is important to note that there was a trial in this case and only a short hearing on a preliminary injunction in Gary-Northwest.

Turning to the remaining challenged provisions, it is clear that Akron Ordinance Sections 1870.06-.07 are violative of the Roe v. Wade standard. These ordinances, requiring that every woman seeking an abortion must be subjected to the reading of a medically inaccurate and biased "script" by the attending physician and must then wait 24 hours before the medical procedure can be performed, are a perversion of the useful and well-respected concept of informed consent. The mandatory disclosures do not provide the information necessary to weigh the medical risks attending abortion procedures, but are calculated to interfere with the process of rational decision-making. Not only do these requirements interfere with the exercise of the attending physician's best medical judgment, they also place unnecessary time, economic, and psychological burdens and pressures upon the woman who is

attempting to exercise her right of procreative choice. Such effects render these ordinances unconstitutional. Roe v. Wade, supra; Doe v. Bolton, 410 U.S. 179 (1973); Danforth, supra.

None of the Akron abortion restrictions are justified by any compelling state interest. In fact, the challenged restrictions are an unwarranted governmental intrusion into a fundamental personal liberty. The ordinances are therefore unconstitutional.

IV

CONCLUSION

In sum, amici believe that this Court is the appropriate body to determine the constitutionality of abortion regulations and in doing so should apply the standard set forth in Roe v. Wade. The Akron ordinances restricting abortion fail to meet this standard and should therefore be declared unconstitutional.

For the foregoing reasons amici respectfully submit that the judgment of the Sixth Circuit Court of Appeals be affirmed in all respects except for the holding that its finding that the mandatory

hospitalization requirement is constitutional.

Respectfully submitted,

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